Supreme Court, U.S.
FILED
AUG 20 1992
OFFICE OF THE CLERK

No. 92-157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM BERNAL,

Petitioner,

—v.—

KOREAN AIR INC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

DESMOND T. BARRY, JR.*
CHRISTOPHER CARLSEN
CONDON & FORSYTH
1251 Avenue of the Americas
New York, New York 10020
(212) 757-6870

Attorneys for Respondent
KOREAN AIR LINES CO., LTD.

*Counsel of Record

QUESTION PRESENTED

Whether the Court of Appeals properly affirmed the District Court's dismissal of Petitioner's Complaint for failure to prosecute and failure to comply with the District Court's Order to commence trial?

RULE 29.1 LIST

Korean Air Lines Co., Ltd. is a member of The Hanjin Group of Korea, which comprises companies under common management direction. The 24 affiliated companies of The Hanjin Group are:

Hanjin Transportation Co., Ltd.
Hanil Development Co., Ltd.
Hanjin Shipping Co., Ltd.
Jungsuk Enterprise Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Air Korea Co., Ltd.
Jedong Industries, Ltd.
Hanjin Travel Service Co., Ltd.
Hanjin Construction Co., Ltd.
Korea Freight Transportation Co., Ltd.
Korea Travel Information Service Co., Ltd.
Hanil Leisure Co., Ltd.
Hanjin Information Systems & Telecommunication Co., Ltd.
Pyung Hae Mining Development Co., Ltd.
Cheju Mineral Water Co., Ltd.
Union Express, Ltd., Co., Ltd.
Hanjin Heavy Industries Co., Ltd.
Femtco Shipping Co., Ltd.
Oriental Fire & Marine Insurance Co., Ltd.
Korean French Banking Corporation—SOGEKO
Hanjin Investment & Securities Co., Ltd.
Inha University Foundation
Jungsuk Foundation
Inha General Hospital

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

RULE 29.1 LIST ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

1. The Nature of the Case 2

2. The Course of Proceedings and Disposition in the Courts Below 3

REASONS WHY THE PETITION SHOULD BE DENIED

The District Court Properly Dismissed Petitioner's Complaint for Failure to Prosecute and Failure to Comply with its Order to Commence Trial of this Action and the Second Circuit Properly Affirmed ... 4

CONCLUSION 6

TABLE OF AUTHORITIES

Cases: PAGE

Ali v. A & G Co., Inc. 542 F.2d 595 (2d Cir. 1976)..... 5

Betts v. Agri-Tech Servs. Inc., 130 F.R.D. 143 (D. Kan. 1990)..... 5

Huey v. Teledyne, Inc., 608 F.2d 1234 (9th Cir. 1979), *cert. denied*, 458 U.S. 1106 (1984) 5

Link v. Wabash R.R. Co., 370 U.S. 626 (1962)..... 5

Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37 (2d Cir. 1982)..... 5

Theilmann v. Rutland Hosp. Inc., 455 F.2d 853 (2d Cir. 1972)..... 5

West v. City of New York, 130 F.R.D. 522 (S.D.N.Y. 1990)..... 5

Statutes, Rules & Treaties:

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934) *reprinted in* 49 U.S.C. App. § 1502 note (1976) (Warsaw Convention)..... 3

Fed. R. Civ. Proc. 41(b)..... 2, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-157

WILLIAM BERNAL,

Petitioner,

—v.—

KOREAN AIR INC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, KOREAN AIR LINES CO., LTD. (sued incorrectly as "KOREAN AIR INC" and hereinafter KOREAN AIR), respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the Order of the Court of Appeals for the Second Circuit which affirmed the District Court's dismissal of this action pursuant to Federal Rule of Civil Procedure 41(b) for failure to prosecute and failure to comply with District Court's Order to commence trial.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Second Circuit is not reported and is reprinted in the Appendix[1] hereto at 1a, *infra*.

The Order of the United States District Court for the Eastern District of New York (Spatt, J.) is not reported and is reprinted in the Appendix hereto at 3a, *infra*.

STATUTORY PROVISION INVOLVED

The statutory provision involved is Federal Rule of Civil Procedure 41(b) which provides:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

STATEMENT OF THE CASE

1. The Nature of the Case

This *pro se* personal injury action arises from Petitioner's unprovoked scissor attack on a fellow passenger on board Korean Air Flight No. KE026 from Seoul, Korea to New York on April 13, 1988. At the time of the scissor attack, Petitioner was experiencing bizarre hallucinations. After the attack, Petitioner was disarmed by KOREAN AIR cabin attendants and

---

1 Numbers preceded by "App." refer to pages in the Appendix annexed to this Brief in Opposition.

other passengers and was handcuffed, bound and tied into a seat in the aircraft. Because of his continued violent and threatening behavior, the Captain of Flight KE026 made an emergency landing in Anchorage, Alaska where Petitioner was removed from the aircraft. Petitioner alleged that after he was subdued, an unidentified KOREAN AIR cabin attendant stabbed him in the leg and also attempted to suffocate him by stuffing a benzene-soaked rag into his mouth.

2. The Course of the Proceedings and Disposition in the Courts Below

Petitioner originally commenced this action on or about August 18, 1988 in the Civil Court of the City of New York, County of Kings. KOREAN AIR subsequently removed the action to the United States District Court for the Eastern District of New York on the grounds of diversity of citizenship jurisdiction and federal question jurisdiction in that the action was governed exclusively by a treaty of the United States.[2]

During a pretrial conference on October 22, 1990, the District Court scheduled trial of this action to commence on January 4, 1991 in the courthouse located in Uniondale, New York. App. 5a, 6a. On January 2, 1991, the District Court's courtroom deputy contacted Petitioner by telephone to ensure that he would be present at the scheduled trial. App.6a-7a. During that telephone conversation, Petitioner advised the deputy that "he could not come to Uniondale and he did not care what happened with the case." App. 7a. On that same day, the District Court's clerk sent to Petitioner, by Express Mail, written notification that he was required to be present at the trial on January 4, 1991 and advising him that his Complaint might be dismissed if he failed to appear. App. 7a-8a. Petitioner thereafter failed to appear for the trial on January 4,

---

2 Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934) *reprinted in* 49 U.S.C. App. § 1502 note (1976) (Warsaw Convention).

1991 and never attempted to contact the District Court to explain his absence. App. 4a-9a.

The District Court granted KOREAN AIR's oral Motion to Dismiss the Complaint pursuant to Federal Rule of Civil Procedure 41(b) based upon Petitioner's refusal to appear at trial and his expressed intent to abandon his case. App. 9a. The District Court's Order dismissing the Complaint was entered on February 12, 1991. App. 3a. Petitioner appealed the dismissal order and on November 12, 1991, the Court of Appeals for the Second Circuit affirmed the District Court's Order. App. 1a.

REASONS WHY THE PETITION SHOULD BE DENIED

The District Court Properly Dismissed Petitioner's Complaint for Failure to Prosecute and Failure to Comply with its Order to Commence Trial of this Action and the Second Circuit Properly Affirmed

No reasons exist for the Court to consider this unintelligible Petition. This case involves the routine and proper exercise of the District Court's discretion to manage its docket after Petitioner's deliberate and unjustified refusal to appear for trial. The Second Circuit's Order affirming the District Court is not in conflict with the decisions of any other United States Court of Appeals and no special or important reason exists for granting the Petition.

Federal Rule of Civil Procedure 41(b) provides in pertinent part:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

The District Court properly dismissed Petitioner's Complaint based upon Petitioner's failure to prosecute and his deliberate

and unjustified refusal to comply with the District Court's explicit Order to commence trial on January 4, 1991.

"The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629 (1962). "The primary rationale underlying a dismissal under 41(b) is the failure of plaintiff in his duty to process his case diligently. Plaintiff's duty of due diligence is imposed because of the strong policy favoring prompt disposition of cases. Prejudice to defendants resulting from unreasonable delay may be presumed." *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 43 (2d Cir. 1982). The scope of review of an order of dismissal is confined "solely to whether the trial court has exercised its inherent power to manage its affairs within the permissible range of its discretion." *Id.*

The plaintiff is obligated to move his case to trial, "and should he fail to do so in a reasonable manner, his case may be dismissed with prejudice as a sanction for his unjustified conduct." *West v. City of New York*, 130 F.R.D. 522, 524 (S.D.N.Y. 1990). Dismissal of a plaintiff's Complaint repeatedly has been held to be proper when the plaintiff refuses to appear for trial. *See e.g., Ali v. A & G Co., Inc.* 542 F.2d 595 (2d Cir. 1976); *Theilmann v. Rutland Hosp. Inc.*, 455 F.2d 853 (2d Cir. 1972); *Betts v. Agri-Tech Servs. Inc.*, 130 F.R.D. 143 (D. Kan. 1990); *Huey v. Teledyne, Inc.*, 608 F.2d. 1234 (9th Cir. 1979), *cert. denied*, 458 U.S. 1106 (1982).

Petitioner was on notice since October 22, 1990 that trial of this action would commence on January 4, 1991. The District Court reminded Petitioner by telephone and mail two days before the trial that he was required to appear for trial and that his case could be dismissed if he failed to appear. Petitioner defied the District Court and refused to appear for trial.

Petitioner's deliberate, unjustified and unexplained defiance of the District Court's Order to appear for trial, and his expressed intent to abandon the prosecution of his case, justi-

fied the District Court's dismissal of his Complaint under Fed. R. Civ. P. 41(b). The Second Circuit's Order affirming the dismissal was proper and no special or important reason exists for granting the Petition.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Dated: New York, New York
August 20, 1992

Respectfully submitted,

DESMOND T. BARRY, JR.*
CHRISTOPHER CARLSEN
CONDON & FORSYTH
1251 Avenue of the Americas
New York, New York 10020
(212) 757-6870

Attorneys for Respondent
KOREAN AIR LINES CO., LTD.

*Counsel of Record

APPENDIX

INDEX TO APPENDIX

PAGE

Order of The United States Court of Appeals for the Second Circuit dated November 12, 1991 ..... 1a

Order of the United States District Court for the Eastern District of New York dated February 12, 1991..... 3a

Transcript of Proceedings held on January 4, 1991 ..... 4a

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

97-6260

November 12, 1991

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of November, one thousand nine hundred and ninety-one.

Present:

Hon. James L. Oakes, *Chief Judge*,
Hon. J. Edward Lumbard, Hon. Frank X. Altimari,
Circuit Judges.

WILLIAM BERNAL,

Plaintiff-Appellant,

—v.—

KOREAN AIR LINES,

Defendant-Appellee.

ORDER

William Bernal, *pro se*, appeals from an order of the United States District Court for the Eastern District of New York, Arthur D. Spatt, *Judge*, dismissing his personal injury claim,

with prejudice, pursuant to Federal Rule of Civil Procedure 41(b) for failure either to prosecute or to comply with the district court's order. For the reasons stated below, we affirm.

Appellant, in essence, argues that the district court's dismissal order constituted abuse of discretion. *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 633 (1962); *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 43 (2d Cir. 1982). A review of the facts indicates that the district court went to great lengths to inform appellant of his trial date and of the consequences of his failure to appear. On October 22, 1990, appellant was informed that the trial would begin on January 4, 1991. On January 2, 1991, the district court's courtroom deputy telephoned appellant to remind him of the upcoming trial. At that time, appellant stated that "he would not come to [the courthouse in] Uniondale and he did not care what happened with the case". Appendix 6. To ensure that appellant was fully informed of the trial date and the consequences of failing to appear, the court, on January 2, also sent Express Mail letters to appellant's residence and place of work. The letters noted that dismissal might result if appellant failed to appear. Yet, on January 4, appellant failed to appear at trial and he offered no explanation for his absence. The district court could properly conclude from appellant's earlier statement and his unexplained absence at trial that appellant did not plan to go forward with his suit.

Affirmed.

/s/ _____
JAMES L. OAKES, Chief Judge

/s/ _____
J. EDWARD LUMBARD, Circuit Judge

/s/ _____
FRANK X. ALTIMARI, Circuit Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DTB 8066
88 CIV. 3042 (ADS)

WILLIAM BERNAL,

Plaintiff,

—against—

KOREAN AIR LINES,

Defendant.

ORDER

This cause came on to be heard on defendant's Motion to Dismiss the action pursuant to Federal Rule of Civil Procedure 41(b) for failure of plaintiff to prosecute the action and failure of plaintiff to comply with the Order of this Court made on October 22, 1990 and January 2, 1991 directing plaintiff to appear and proceed with the trial of this action commencing on January 4, 1991, and the Court having heard the argument of counsel, and it appearing to the Court that plaintiff has failed to prosecute this action with due diligence and failed to appear and proceed with the trial of this action in accordance with the terms of the aforesaid Order, it is

ORDERED, that this action be and is hereby dismissed with prejudice, without costs to defendant.

Dated: New York, New York
February 12, 1991

/s/ _____
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 88 3042
January 4, 1991

WILLIAM BERNAL,

Plaintiff,

—against—

KOREAN AIRLINES,

Defendant.

Before:

HONORABLE ARTHUR D. SPATT, U.S.D.J.

APPEARANCES:

For the Plaintiff: WILLIAM BERNAL, Pro se

For the Defendant: CONDON & FORSYTH, ESQS.
1251 Avenue of the Americas
New York, N.Y. 10020
By: CHRISTOPHER CARLSEN, ESQ.

Court Reporter: HARRY RAPAPORT, C.S.R.
U.S. District Courthouse
Two Uniondale Avenue
Uniondale, N.Y. 11553
(526) 485-6558

THE CLERK: Civil cause for jury selection, William Bernal against Korean Air Lines.

MR. CARLSEN: Good morning, your Honor. Christopher Carlsen from the firm of condon and forsyth, CARLSEN.

THE COURT: Did you see Mr. Bernal at all?

MR. CARLSEN: No, he is not here yet.

THE COURT: Have you communicated with him at all?

MR. CARLSEN: No, not since our last conference, your Honor.

THE COURT: My courtroom deputy communicated with him I believe on Wednesday. You were notified at a conference that we will be selecting a jury today; is that correct?

MR. CARLSEN: Yes.

THE COURT: And when did that conference take place? Do you recall?

MR. CARLSEN: I believe it was October 22. I am not sure of the date.

However, your Honor, I did receive a copy of your clerk's letter which was delivered to Mr. Bernal yesterday, I believe, by Federal Express. I received my copy of that letter yesterday by Federal Express, which I noted specifically directed him to appear in this courtroom at 9:30 this morning, as he had been directed at the prior conferences, and that if he failed to show up you would perhaps dismiss his case.

THE COURT: It said that I may dismiss the complaint.

MR. CARLSEN: Yes, sir.

THE COURT: He has not shown up apparently. And we called his place of business this morning, Mr. Carlsen. He had not appeared yet. He is supposed to be there at 10:00 o'clock this morning. And we will try to call him then. So, you will please standby. I will consider what remedy to take when I decide one way or another whether he is coming in or not and then we will put it on the record at that time.

MR. CARLSEN: Yes, sir.

THE COURT: So, we will call it again.

(Recess taken while other matters are taken up by the Court.)

THE CLERK: Civil cause for jury selection, CV 88 3042, William Bernal against Korean Airlines.

THE COURT: Is the plaintiff William Bernal present?

MR. CARLSEN: No, he is not, your Honor.

THE COURT: Do you know the plaintiff William Bernal?

MR. CARLSEN: Yes. I know what he looks like yes, sir.

THE COURT: Were you present at any other time when he was present?

MR. CARLSEN: Yes, sir. I have attended, your Honor, approximately four or five prior conferences in this case.

THE COURT: Were you the lawyer who argued the defendant's motion for summary judgment?

MR. CARLSEN; Yes, sir.

THE COURT: According to the record that I have, after I denied the defendant's motion for summary judgment there was a conference on July 5, 1990. Does that coincide with your record?

MR. CARLSEN: Yes, sir.

THE COURT: At that conference settlement negotiations took place and the plaintiff's settlement demand was eight million dollars as I recall. Do you recall that, Mr. Carlsen?

MR. CARLSEN: Yes, your Honor.

THE COURT: At that time I said that that settlement was impossible and we would have to try this case.

There was another conference on October 22, 1990. Were you present at that conference?

MR. CARLSEN: Yes, your Honor.

THE COURT: The plaintiff still wanted millions at that time. I then told the plaintiff and you that we would select a jury on January 4th, 1991, in Uniondale.

MR. CARLSEN: That's correct.

THE COURT: At that time Mr. Bernal stated he wanted me to leave the case in Brooklyn; do you recall that?

MR. CARLSEN: Yes, sir.

THE COURT: And I said, no. Because I am now out here 100 percent of the time. Previously I had been in Brooklyn up until completed a long criminal trial.

Then on Wednesday, January 2nd my good courtroom deputy, to make sure that everyone was going to be here called

the parties in various cases that were in to select a jury, including this case, and he spoke to Mr. Bernal.

Is that right, Mr. Zuniga?

THE CLERK: Yes, sir.

THE COURT: What did he say at that time?

THE CLERK: At that time he said he could not come to Uniondale and he did not care what happened with the case.

THE COURT: All right.

When we heard that message I had my equally good law clerk, Nelson A. Boxer, write a letter by express mail to Mr. William Bernal both at his home at 601 West 173rd Street, apartment 37, New York, New York 10032, and to his place of business at 300 Jay Street, Brooklyn, New York, 11201.

Where does he work? Is that the Transit Authority?

MR. CARLSEN: No, your Honor, I believe that's a university. He works in an audio visual department in some university.

THE CLERK: New York Technical College.

THE COURT: No wonder he liked the Brooklyn courthouse. That's across the street. He went across the street then.

Where is your office, Mr. Carlsen?

MR. CARLSEN: In Manhattan, your Honor, 50th Street.

THE COURT: You had to come from Manhattan also.

Well, we wrote this letter, Mr. Boxer did, and I will read it into the record, a rather good letter.

Dear Mr. Bernal, which was sent to both his home and office.

Judge Spatt asked me to inform you that he directs you to appear at the United States Courthouse, Uniondale Avenue at Hempstead Turnpike, Uniondale New York 11553 on Friday January 4, 1991, 9:30 a.m., to select a jury in the above captioned case, period.

At a pretrial conference on October 22, 1990, Judge Spatt scheduled jury selection to go forward on January 4th, 1991.

As a result Judge Spatt has also asked me to inform you that if you failed to appear for jury selection on January 4th, at 9:30 a.m. this is Friday, he may dismisses your complaint.

If you need any directions or information concerning the location of the United States Courthouse in Uniondale you can telephone the clerk's office at 516, 485-1701, period.

Very truly your, Nelson A. Boxer, Esquire, law clerk to Honorable D. Spatt, United States District Court.

Nelson, I like that letter. I like it because I saw it before it went out.

In any event we have no reason to believe that Mr. Bernal did not receive the letter. You received your letter, did you not?

MR. CARLSEN: Yes, your Honor.

THE COURT: How did you receive your copy?

MR. CARLSEN: By Federal Express on January 3rd, yesterday.

THE COURT: What time did you receive it approximately?

MR. CARLSEN: I am not sure what time it got to my office. It landed on my desk about 3:00 o'clock.

THE COURT: Your office is in Manhattan, so I assume Mr. Bernal received it both at his office and his home or certainly one of these places. And especially in view of the fact that he told my deputy clerk he is not coming to Uniondale or can't get to Uniondale and doesn't care what happens to the case; that is a clear indication or evidence of abandonment of this case.

Under the circumstances here what is your application, Mr. Carlsen?

MR. CARLSEN: Your Honor, on behalf of Korean Airlines we would move to dismiss plaintiff's complaint in its entirety against Korean Air, under Rule 41(b), based on plaintiff's failure to prosecute this case, his articulated intention to abandon it, and also his express disobedience of this Court's order and directions directing him expressly to be here today. Korean Airlines is here and ready to go to trial. We have our witnesses here.

THE COURT: Do you have witnesses here?

MR. CARLSEN: Yes, your Honor, I have one witness in the courtroom now. I also have two that are leaving for Korea tomorrow morning. If I call them I can prevent them from getting on the plane. But I have one witness in the courtroom.

THE COURT: Who is the witness?

MR. CARLSEN: Mr. Roberts Composa. He was a passenger on the plane who helped to restrain and subdue Mr. Bernal during the scissors attack event.

THE COURT: The Court having reviewed already for the record the fact that I directed Mr. Bernal to be here for the selection of the jury orally on October 22, 1990; that I further had my deputy courtroom clerk deputy direct him to be here, and that was done on Wednesday; that he further stated that he is not coming to Uniondale or can't get to Uniondale and doesn't care what happens to the case, which is evidence of an intentional abandonment of his rights in this occasion, and, further, with respect to the letter that was sent to him by Federal Express directing him to be present, and stating that I may dismiss the complaint, I find that there has been a failure on the part of the plaintiff both to prosecute this action, move it along, and to comply with a direct order of the Court. Therefore, your motion to dismiss this complaint based upon all these factual predicates is granted.

You are to submit an order on notice.

MR. CARLSEN: Yes. Thank you, your Honor.

THE COURT: I also want to add for the record—no, that's sufficient. Thank you very much.

MR. CARLSEN: Yes, sir.

(END OF PROCEEDINGS.)